

**BOARD OF ENVIRONMENTAL REVIEW
AGENDA ITEM**

EXECUTIVE SUMMARY FOR ACTION ON RULE ADOPTION

Agenda # III.A.2

Agenda Item Summary: The Department requests the Board to delay taking action on the proposed amendments to the rules for concentrated animal feeding operations (CAFOs) due to a recent court ruling in Waterkeeper Alliance, Inc., et al. v. EPA, (2005 U.S. App. LEXIS 3395). In that case, the second circuit court of appeals vacated portions of the United State's Environmental Protection Agency's (EPA's) revisions to the federal CAFO rules promulgated in 2003 as violating the federal Clean Water Act (CWA). Since the State's proposed CAFO amendments incorporate the federal rules, a brief summary of the court's ruling is provided.

The federal court vacated two features of the EPA rules. The first imposed a duty on all CAFOs to either apply for a permit or demonstrate no potential to discharge. The court found that the federal CWA applies only to *actual* discharges, not to *potential* discharges. For this reason, the Court found that EPA could not impose a "duty to apply" on all CAFOs based on a mere presumption that a CAFO is likely to discharge. The court found that, to the extent the rules imposed a duty on all CAFO's to apply for a permit (whether or not they had an actual discharge) or affirmatively demonstrate there was no potential to discharge, this feature of the rule was contrary to the CWA.

The second feature vacated by the federal court concerned the nutrient management plan (NMP). The federal rules require all CAFOs to develop and implement a NMP as a condition of the permit. The court upheld the requirement to develop and implement a NMP, which was promulgated by EPA as an effluent limitation for CAFOs. The Court went on to hold, however, that - in addition to the duty to develop and implement NMPs - the *terms* of the NMPs themselves were enforceable effluent limitations. As such, the Court concluded that the terms of the NMPs must be reviewed by the permitting agency and incorporated into the permit. Ultimately, the Court found that portions of the NMP rules violated the CWA, because the rules failed to: (1) require agency review of the plans; (2) incorporate the terms of the NMP into the permit; and (3) provide public comment on the NMP. Although the court vacated portions of the rules due to these deficiencies, the court left intact the requirement to develop and implement a nutrient management plan as an effluent limitation for CAFOs.

Finally, the federal court directed EPA to make additional findings concerning other revisions to the CAFO effluent limitations guidelines adopted in 40 CFR Part 412. Although the Court remanded Subpart D of Part 412 to EPA for further explanation, the court did not vacate any of the revised effluent guidelines. The state CAFO rules adopt the Part 412 effluent limitations by reference, including the duty to develop and implement a nutrient management plan for all CAFOs.

DEQ is still in the process of evaluating the court's ruling with respect to its impact on the State's proposed CAFO rules. DEQ is recommending that the Board not take any action on the proposed rules until

guidance is provided by EPA on the status of the federal CAFO rules.

List of Affected Rules: This rulemaking would have amended ARM 17.30.1303, 1304, 1310, 1322, 1330, 1341 and 1343.

Affected Parties Summary: The proposed rule amendments, if adopted, affect all CAFOs.

Scope of Proposed Proceeding: The Board will consider recommendations from the Department regarding the proposed CAFO rules.

Hearing Information: A hearing in the matter was conducted before Thomas Bowe on January 14, 2005. Comments were received from interested parties.

Board Options: The Board may:

1. Decide to delay taking action on the proposed amendments;
2. Direct the Department to prepare an additional notice. An additional notice could extend the rulemaking, adopt all or a part of the amendments, or request public comment on modified rule amendments.

DEQ Recommendation: The Department recommends that the Board defer action on the rules until the June 3 BER meeting.